IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2006

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.146 of 2003
(Appeal No.137 of 2003)

Commissioner of Income Tax,
Tiruchirapalli. ..Appellant

Vs

M/s.Thirumalai Fertiliser & Co.
Kulithalai. ..Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras, 'A' Bench in I.T.A. No.864(Mds)/2000 dated 19.03.2003 for the assessment year 1994-95 against the order of the Commissioner of Income Tax (appeals) XIII 121, Mahatma Gandhi Road, Chennai-600 034 dated 24.2.2000 and made in ITA No.153 & 154/1999-2000 against the order of the Income Tax Officer, City Ward II (1) (con) Tiruchirappalli, dated 16.8.99 and made in G.I.No.341-T (coy) TRY for the Assessement Year 1994-95.

For Appellant : Mr.J.Narayanaswamy
Jr. Standing Counsel
IT Dept.

For Respondent : Mr.N.Quadri Hussain

JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

The present appeal is filed under Section 260A of the Income Tax Act, 1961 by the Revenue against the order passed in I.T.A. No.864/Mds/2000 by the Income Tax Appellate Tribunal, Madras, 'A' Bench. On 21.10.2003, this Court admitted the appeal and formulated the following question of law.

> "1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessment could be rectified u/s 154 of the IT Act to ensure that the statutory provisions of Sec.44AE were complied with or it would amount to a redoing

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of the assessment?"

2. The facts leading to the above question of law are as under:

The relevant assessment year is 1994-95 and the accounting year ended on 31.03.1994. The assessee is a registered firm. The assessee is a dealer in fertiliser and also derived income from plying 3 lorries. The assessee filed return of income for the said assessment year on 13.02.1995 declaring a total loss of Rs.2,18,712/-. Later, a notice under Section 143(2) of the Income Tax Act (hereinafter referred to as the "Act"), was served directing the assessee to furnish details. After the details were furnished by the assessee, the Income Tax Officer completed the assessment under Section 143(3) of the Act, accepting the total loss return by the assessee. Further, he made addition by estimating the business income from 2 lorries under Section 44AE at Rs.48,000/- and declared the assessment as 'N.A.'. Later, the Income Tax Officer was of the view that there was a mistake in the regular assessment on the ground that, instead of estimating the income from 3 lorries, income from 2 lorries were alone estimated and further, the deductions-expenses relating to the lorries were to be disallowed while resorting to estimating income under Section 44AE of the Act and hence, the same was to be rectified. In consequence, he issued a notice under Section 154 of the Act to the assessee on 15.2.1999 and again a reminder was also issued on 06.05.1999. In response to the said notice under Section 154 of the Act, the assessee informed the Assessing Officer that the assessee had maintained proper books of account in respect of the income from lorry business and there was no mistake in the regular assessment passed by the Assessing Officer under Section 143(3) of the Act. Rejecting the contention, the Assessing Officer rectified the order making additions, and held as follows:

Total loss as per A.O. dt.13.9.96			Rs.1,64,712
Add: (1) Losses of 2 lorries debited in P&L Account	Rs. 78,684		
(2) Interest on H.P. Loan	Rs. 65,095		
(3) Depreciation claimed for 3 lorries	Rs.3,22,708		
		Rs.4,66,487	
			Rs.3,01,775
Less: Income offered in respect of lorry TN-47-7216			Rs. 36,535
			Rs.2,65,240
Add : Income estimated u/s 44AE in respect of above lorry			Rs. 24,000
Revised total income			Rs.2,89,240

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Tax thereon	Rs.1,15,696
Add: Surcharge at 12%	Rs. 13,884
Balance payable	Rs.1,29,580
Add: Interest u/s 234-A	Rs. 10,360
Interest u/s 234-B	Rs. 77,700
Total payable	Rs.2,17,640

Aggrieved by the order, the assessee filed an appeal to the Commissioner of Income Tax (Appeals). The C.I.T.(A) allowed the appeal and deleted the additions made in the rectification order. Aggrieved by the order, the revenue filed an appeal to the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal'). The Tribunal dismissed the revenue's appeal and confirmed the order of the first appellate authority.

3. The learned standing counsel appearing for the revenue submitted that, not following the statutory provision earlier by the Assessing Officer, amount to mistake apparent on the face of the record and hence the same was subjected to rectification under Section 154 of the Act. The learned standing counsel relied on the Madhya Pradesh High Court judgment reported in 274 ITR 225 to support his contention.

4. The learned counsel appearing for the assessee submitted that the Assessing Officer admitted the loss return by the assessee and further to the acceptance of the loss return, he also made addition estimating income from lorries. Eventhough the said estimated addition is not warranted in law, the assessee accepted the estimated addition due to the smallness of the amount and also in order to purchase peace with the Department.

5. Heard the counsel. Section 44AE of the Act, was introduced by the Finance Act of 1994 with effect from 01.04.1994. The relevant provision of Section 44AE, stands during the accounting year reads as follows:

> "Special Provision for computing profits and gains of business of plying, hiring or leasing goods carriages.
> 44AE. (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee, who owns not more than ten goods carriages and who is engaged in the business of plying, hiring or leasing such goods carriages, the income of such business chargeable to tax under the head "Profits and gains of business or profession" shall be deemed to be the aggregate of the profits and gains, from all the goods carriages owned by him in the previous year, computed in accordance with the provisions of sub-section(2).

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(2) For the purposes of sub-section (1), the profits and gains from each goods carriage,-

(i) being a heavy goods vehicle, shall be an amount equal to two thousand rupees for every month or part of a month during which the heavy goods vehicle is owned by the assessee in the previous year or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income;

(ii) other than a heavy goods vehicle, shall be an amount equal to one thousand eight hundred rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income.

(3) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section(1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed:

(4) The written down value of any asset used for the purpose of the business referred to in sub-section(1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(5) The provisions of sections 44AA and 44AB shall not apply in so far as they relate to the business referred to in sub-section(1) and in computing the monetary limits under those sections, the gross receipts or, as the case may be, the income from the said business shall be excluded.

(6) Nothing contained in the foregoing provisions of this section shall apply, where the assessee claims and produces evidence to prove that the profits and gains from the aforesaid business are lower than the profits and gains specified in sub-sections (1) and (2), and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee and determine the sum payable by the assessee on the basis of assessment made under sub-section(3) of section 143."

The said section provides the method of estimating the income from the business of plying, hiring or leasing trucks owned by the assessee. The section applies to persons owning not more than ten trucks. The income from each truck, being a heavy goods vehicle, is estimated at Rs.2,000/- for every month or part of a month. The income from each truck, other than a heavy goods vehicle, is estimated at Rs.1,800/- for every month or part of a month. The estimate is a comprehensive one. As per Section 44AE(3), any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section(1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed. The scheme is optional. If the assessee produce evidence that profits and gains from the business of

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plying the lorries during the year is less than the profits and gains specified in Sub Sections (1) and (2), the Assessing Officer should proceed to make the assessment and determine the total income or loss under Section 143(3) of the Act. The said option is given to the assessee under Section 44AE (6) of the Act.

6. In this case, the assessment was made under Section 143(3) of the Act and the Assessing Officer accepted the return of loss filed by the assessee. Further he estimated the income by way of addition of Rs.48,000/- from lorries under Section 44AE of the Act. From the records it is seen that the assessee maintained books of account and filed profit and loss account, which was considered by the Assessing Officer in determining the income. Once the books of account were accepted, it is wrong on the part of the Assessing Officer to estimate under Section 44AE of the Act. Eventhough the Assessing Officer was wrong in estimating the lorry income, the assessee did not prefer an appeal against the assessment due to the smallness of the amount involved and also to purchase peace with the Department. The Assessing Officer trying to make assessment under Section 44AE by invoking the rectification proceeding under Section 154 of the Act, is not justified. It amounts to reassessing the income, which is not permissible under Section 154 of the Act. Section 154 is meant for carrying out rectification of mistake which is apparent on the face of the record. Applying the provision of Section 44AE to the present case by the Assessing Officer, by invoking under Section 154 of the Act, is a controversial and debatable one and hence there is no mistake that could be rectified under Section 154 of the Act. While interpreting the scope of rectification under Section 154 of the Act, the Supreme Court, in the case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers and Others, reported in 82 ITR 50, held as follows:

> "A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record."

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From a reading of the above Supreme Court observation, it is clear that only apparent mistake and non-debatable issue, would be the subject matter of rectification under Section 154 of the Act. In the present case, the issue as to whether Section 44AE will apply or not, is itself a debatable one and hence, the Assessing Officer has no jurisdiction to rectify under Section 154 of the Act. The Madhya Pradesh High Court judgment relied on by the learned counsel for the revenue reported in 274 ITR 225 is not relevant to the facts of the present case. In that judgment, no statutory provision was followed when completing the assessment. Later, the revenue rectified the assessment by following the statutory provision. On the facts, it was held that the Assessing

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Officer was right to rectify under Section 154 on the ground that the Assessing Officer had not followed the statutory provision. Not following the statutory provision, amount to mistake apparent on the face of the record and hence the rectification under Section 154 is applicable. In the present case, the facts are different and hence the judgment relied on by the learned counsel for the revenue, is not relevant to the facts of the present case.

7. Both the lower authorities rightly held that the Assessing Officer has no authority to rectify the assessment order under Section 154 of the Act. In view of the foregoing reasons, we are of the view that there is no error or infirmity in the order of the Tribunal and the same does not require interference. Hence, we answer the question of law in favour of the assessee and against the revenue and the tax case is dismissed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. THE ASSISTANT REGISTRAR
INCOME TAX APPELLATE TRIBUNAL
III FLOOR, RAJAJI BHAVAN,
BESEANT NAGAR , CHENNAI 90

2. THE SECRETARY
CENTRAL BOARD OF DIRECT TAXES
NEW DELHI.

3. THE COMMISSIONER OF
INCOME TAX, TIRUCHIRAPPALLI.

4. THE COMMISSIONER OF
INCOME TAX (APPEALS) XIII
NO.121, MAHATMA GANDHI ROAD,
CHENNAI 34.

5. THE INCOME TAX OFFICER
CITY WARD II (1) (CON)
TIRUCHIRAPPALLI.

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6. THE ASSISTANT COMMISSIONER
OF INCOME TAX, COMPANY CIRCLE,
TIRUCHIRAPPALLI.

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km/6.9.

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